92-827

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1992, Term

RAYMOND H. COPP, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

(1) Did the First Circuit fail to consider the decisions of other Circuit Courts and the United States Supreme Court in limiting the Taxpayer's right to an evidentiary hearing where the Revenue Agent has submitted an affidavit in support of summary enforcement, and the taxpayer has alleged improper purpose for issuance of a third party summons?

B. LIST OF ALL PARTIES TO THE PROCEEDING

(1) Raymond H. Copp, Jr., Petitioner

(2) United States of America, Respondent

C. TABLE OF CONTENTS

A. Questions Presented for Review i

B. List of all Parties to the Proceeding ii

C. (1) Table of Contents.....ii

(2) Table of Authorities .....iii, iv

D. Official Report.....1

E. Jurisdictional Grounds.....1

F. Statutory Provision.....2

G. Statement of the Case.....2

H. State Court Review Inapplicable 10

I. Basis for Federal Jurisdiction 10

J. Reasons Relied upon for Allowance of the Writ.....10

K. Appendix

i Raymond H. Copp, Jr. v. United States, 968 F.2d 1435 (1st Cir. 1992) 14

ii Statutory Provisions.....18

TABLE OF AUTHORITIES
CITATIONS

Cases:

Copp v. United States, 968 F.2d 1, 1435 (1st Cir. 1992).....20

Hintze v. Internal Revenue Service, 879 F.2d 121 (4th Cir. 1989) 19

Reisman v. Caplan, 375 U.S. 440 (1964) 16

Tulchinsky v. I.R.S., No. 90-421 (D.N.H. Dec. 18, 1990).....14,15

United States v. Alphin, 809 F.2d 236 (4th Cir.), cert. denied, 480 U.S. 935 (1987) 19

United States v. Church of Scientology, 520 F.2d 818 (9th Cir. 1975).....18,20

United States v. Freedom Church, 613 F.2d 316 (1st Cir. 1979) 10,13,14,20

United States v. Garden State Nat'l. Bank, 607 F.2d 61 (3rd Cir. 1979) 18

United States v. Harkins, 628 F.2d 875 (5th Cir. 1980).....17

United States v. Kis, 658 F.2d 526 (7th Cir. 2981), cert. denied sub nom Salkin v. United States, 455 U.S. 1018 (1982).....17,18

United States v. LaSalle Nat'l. Bank, 437 U.S. 298 (1978).....16

United States v. McCarthy, 514 F.2d 368 (3rd Cir. 1975).....17,18

United States v. Powell, 379 U.S. 48 (1964).....16

United States v. Roundtree, 420 F.2d 845 (5th Cir. 1970).....17

United States v. Salter, 432 F.2d 697 (1st Cir. 1970).....13

United States v. Samuels, Kramer & Co., 712 F.2d 1342 (9th Cir. 1983) 18

United States v. Southeast First Nat'l. Bank of Miami Springs, 655 F.2d 661 (5th Cir. 1981) 17

United States v. Will, 671 F.2d 963 (6th Cir. 1982).....19

United States v. Wright Motor Co., 536 F.2d 1040 (5th Cir. 1976), rehearing denied 542 F.2d 576 (1976).....17

Statutes:

Internal Revenue Service Code of 1986 (26 U.S.C.) § 7602.....4,5

§ 7609.....7

D. OFFICIAL REPORT

Official Report of the First Circuit's Decision can be found at Raymond H. Copp, Jr. v. United States, 968 F.2d 1435 (1st Cir., 1992). The decision of the lower court is not reported but may be found at Appendix A-60.

E. JURISDICTIONAL GROUNDS

(i) Date of Entry of Judgment July 14, 1992.

(ii) No request for a rehearing was made by Petitioner, and no extension of time was granted for filing this Petition for Certiorari.

(iii) This is not a cross petition for Certiorari and SCR 12.3 is not applicable.

(iv) The statutory provision

conferring jurisdiction on this Court to review the judgment of the First Circuit is 28 U.S.C. 1254(1)

F. STATUTORY PROVISIONS

26 U.S.C. 7602 (1986)

G. STATEMENT OF THE CASE

The Taxpayer/Petitioner Raymond H. Copp, Jr. (hereinafter "the Taxpayer") is an individual who resides in Meredith, New Hampshire (A-2).[1] The Internal Revenue Service (hereinafter "the I.R.S.") through Revenue Agent Ernest Van Loan is conducting an examination of the income tax liabilities of the Taxpayer (Van Loan Declaration A-53-59). The I.R.S.

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[1] "A" references are to Appellant's separately bound record appendix.

previously issued an administrative summons on Goldman Sachs & Co. (hereinafter "Goldman") concerning the Taxpayer on January 14, 1991 (A-1). At the time the original summons was issued, only tax year 1988 was under audit by the IRS (A-3). On January 30, 1991, the Taxpayer filed a Petition to Quash that summons in the Southern District of New York (A-1). The case was docketed for expedited hearing on March 12, 1991 (A-1). Prior to the scheduled hearing date and at the request of Assistant U.S. Attorney Stephen Froot, who believed the original summons was overbroad, the I.R.S. withdrew the original summons (A-1).

On or about March 4, 1991, the Taxpayer's counsel received a document request for production of documents for tax years 1985-1989 (A-90). Taxpayer's

counsel offered to produce on an expedited basis all requested documents for the two open years, 1987 and 1989 but told Revenue Officer Van Loan that the documents for the closed years were not readily available (A-91). However, the IRS insisted on production for all years within a two week period or it would issue a summons (A-92).

On or about April 5, 1991, the I.R.S. issued a second summons to Goldman (A-1). The summons required production by Goldman on May 8, 1991 of records of the Taxpayer for the tax periods 1985-1989 (A-1).

In the Taxpayer's Petition to Quash the I.R.S. summons of April 5, 1991, the Taxpayer alleged that the summons should be quashed on the following grounds: (1) it was overly broad (A-11, ¶¶ 14-15); (2) it was issued for an improper purpose (A-6-11); (3) it should have been served on

the New York office of Goldman Sachs & Co. (A-7-8,) ¶ 9, 10); (4) the Internal Revenue Service issued the summons after it had referred the matter to the Department of Justice to investigate Taxpayer's potential criminal liability (A-10) ¶ 12); and (5) the information is not relevant to tax years other than 1988, to which the civil audit "has largely been limited" (A-10-13 ¶¶ 13, 16).

On June 21, 1991, the Respondent/Appellee United States of America (hereinafter "the Government") filed a response to the Motion to Quash (A-17-25).

On July 12, 1991, the Government moved for a protective order in response to the set of interrogatories served by the Taxpayer with the U.S.A. (A-26-27). That motion was referred to Magistrate Cohen who on August 7, 1991 granted the

Government's request for a Protective Order (Order found at A-28-31).

On August 21, 1991, the Taxpayer filed a Motion to Reconsider Magistrate Cohen's ruling of August 7, 1991 (A-32). The basis for said Motion was to allow Magistrate Cohen an opportunity to consider the decision of Judge Stahl of the United States District Court of New Hampshire dated August 7, 1991 in the companion case involving the Taxpayer and eight other third parties wherein Judge Stahl had determined that the "sole criminal purpose" test of United States v. LaSalle, 437 U.S. 298 (1978), had survived TEFRA 26 U.S.C. § 7602(b), and (c) (2) (A-32-35) (Judge Stahl's decision can be found at A-66-78).

On September 25, 1991, the Government filed a motion for summary enforcement of

the summons (A-37-52).

In support of its motion, the Government submitted a declaration of Revenue Agent Van Loan, in which he stated that he is conducting an examination to determine Taxpayer's correct federal income tax liability for the taxable years 1985 through 1989; that the information sought pursuant to the summons would assist in the determination of Taxpayer's tax liability for those years; that, with the exception of one document turned over by Taxpayer, the requested information was not already in the possession of the Government; and that all procedures required by the Internal Revenue Code had been followed with respect to this summons. (A-53 Van Loan Declaration). Revenue Agent Van Loan also declared that "there is no 'Justice Department'

referral, as that term is described in 26 U.S.C. § 7602(c) (1982), in effect with respect to the Taxpayer for any of the taxable years 1985 through 1989." (A-54 Van Loan Declaration, ¶ 4).

On November 27, 1991, the District Court without a hearing granted the Government's motion for summary enforcement (A-60). Judge Mazzone handwrote on the first page of the Government's Motion the following:

> "On the basis of the uncontroverted [Revenue Agent] Van Loan affidavit, there is no criminal referral, the summons was issued in good faith to make a correct determination of the [Taxpayer's] federal income tax liabilities, if any, for the taxable years under investigation, and all of the required procedures of the Internal Revenue Code have been followed (A-61)."

The enforcement order required Goldman Sachs & Co. to appear, to testify,

and to produce the documents demanded by the summons on December 13, 1991 (A-62-64).

On December 6, 1991, the Taxpayer filed a motion for reconsideration and/or to alter or amend the enforcement order (A-84-88). The grounds for that motion were primarily that the United States District Court for the District of New Hampshire, which was considering Taxpayer's motion to quash eight additional summonses issued to different third parties for the years at issue, held that Taxpayer was entitled to an evidentiary hearing at which he could examine Revenue Agent Van Loan. (See December 3, 1991, Order of the District Court for the District of New Hampshire, (A-79). That Court ordered the hearing because it held that the "sole criminal

purpose" defense survived the 1982 amendments to 26 U.S.C. § 7602, passed as part of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), and it found that the Taxpayer in that case had made a "sufficient showing" to pursue said "sole criminal purpose" defense (A-82).

On December 18, 1991, the District Court denied without opinion Taxpayer's motion for reconsideration and/or to alter and amend the judgment and his motion for a stay pending appeal.

On December 23, 1991, the Taxpayer filed a notice of appeal "from the enforcement order and judgment dated on the 27th day of November, 1991... and from the denial of the Motion for Reconsideration on December 18, 1991..." (A-95).

On July 14, 1992, the First Circuit affirmed the decision of the District Court.

H. STATE COURT REVIEW INAPPLICABLE

This is not a review of a State Court Action.

I. BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction in the first instance is 26 U.S.C. § 7609 (h).

J. REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The First Circuit erred in failing to reaffirm its earlier decision in United States v. Freedom Church, 613 F.2d 316 (1st Cir., 1975) and to rule in accordance with other circuit courts which have allowed taxpayers the right to an evidentiary hearing in an I.R.S. summons

proceeding where "a minimum threshold" of evidence has been presented by the Taxpayer to the Trial Court.

By order dated November 27, 1991 (A-61), Judge Mazzone summarily enforced the I.R.S. administrative summons which the Taxpayer had moved to quash on the basis of it being overly broad, issued for an improper purpose, brought in the wrong forum, and issued subsequent to a criminal referral (A-1-15). In his order, Judge Mazzone did not discuss Taxpayer's request for an evidentiary hearing to examine the revenue agent. (Petition ¶ 17, A-14). Prior to Judge Mazzone's order, Magistrate Cohen had granted the Government a protective order for interrogatories submitted by the Taxpayer (A-28-31). As part of the Opposition to the I.R.S. motion for summary enforcement, counsel

for Taxpayer submitted the identical affidavit earlier filed in the New Hampshire case (A-89-94). That affidavit averred facts which taken together reflect upon the good faith purpose and the commitment to seek criminal prosecution, to wit: that the Justice Department originally sought production in New York; that after the action was set for hearing, the summons was voluntarily withdrawn; that the audit was expanded to include closed years and that the service made a rapid push for production (A-89-94).

Judge Stahl of the District Court of New Hampshire did grant an evidentiary hearing to the Taxpayer in the parallel case, Raymond H. Copp, Jr. v. United States of America, Civ. No. 91-069-S, U.S.D.C. of N.H. (1991) (A-79-83). In the New Hampshire action, the Taxpayer had

filed the same interrogatories, counsel's affidavit, and requested an evidentiary hearing to examine the revenue agent as well. Judge Stahl found that the Taxpayer had followed the requisite procedure:

> Where, as here, Petitioner has made a sufficient showing to pursue a "sole criminal purpose" defense, the Court should 'proceed directly to a hearing at which, if desired, the summonee could examine the agent who issued the summons concerning his purpose. Here it could then, by observation and where necessary, its own questioning of the agent, make its own determination of whether exploration, as by discovery, seemed to be in order.
>
> United States v. Salter, 432 F.2d 697, 700 (1st Cir. 1970) (citations omitted); see also United States v. Freedom Church, 613 F.2d 316, 323 (1st Cir. 1979) (affirming right of summoned party who "evinces an interest in taking advantage of the adversary proceeding to which he is entitled prior to enforcement of an IRS summons"). Order, p.3. (A-82)

The First Circuit in United States v. Freedom Church, 613 F.2d 316 (1st Cir. 1979) referred to the requirement of a "sufficient showing" as a "threshold challenge" to the summons:

> "What is contemplated in Salter and in the cases cited supra is a threshold challenge to the summons by the summoned party, who thereby evinces an interest in taking advantage of the adversary proceeding to which he is entitled prior to enforcement of an I.R.S. summons." Freedom Church, 613 F.2d 316, 323.

The "threshold challenge" was similarly met by the Taxpayers in the recent New Hampshire case, Tulchinsky v. I.R.S., No. 90-421 (D.N.H. Dec. 18, 1990) (1990 U.S.Dist. LEXIS 17997). In Tulchinsky, the Taxpayers were granted an evidentiary hearing once they placed the summons in issue:

> "Upon review of the allegations and facts set forth by the

> Petitioners and in light of the possible inferences to be drawn therefrom, the Court finds that Petitioners have satisfied their burden of placing in issue the I.R.S.'s purpose in issuing summonses to Attorneys Sullivan and Conperto." Tulchinsky, 1990 U.S. Dist. LEXIS 17997 at 5.

The "threshold challenge", or a "sufficient showing", was satisfied by the Taxpayer in Tulchinsky alleging specific facts implying an improper purpose to the summons.

Judge Stahl, in his order, followed this same analysis to find that the taxpayer had met the minimum threshold. In a footnote in his Order regarding the "showing sufficient to pursue a 'sole criminal purpose' defense," (A-82), Judge Stahl wrote:

> The Court finds Petitioner's allegation that the summonses seek evidence from years outside the scope of Petitioner's civil

> audit, see Petition to Quash at ¶ 8, when coupled with the affidavit submitted by Petitioner's counsel, see Exhibit "A" attached to Petitioner's Memorandum in Response to Defendant's Motion for Summary Denial of Petition, constitute such "sufficient showing." (A-82).

The United States Supreme Court has affirmed the right to an adversary hearing prior to enforcement of an I.R.S. administrative summons. United States v. Powell, 379 U.S. 48, 58 (1964). At the hearing the "taxpayer may challenge the summons on any appropriate ground" Reisman v. Caplan, 375 U.S. 440, 499 (1964).

The Fifth Circuit has held that properly pleaded allegations of improper purpose are sufficient alone to trigger an evidentiary hearing. See United States v. Wright Motor Co., 536 F.2d 1090 (5th Cir.

1976) rehearing denied 542 F.2d 576 (1976), United States v. Roundtree, 420 F.2d 845 (5th Cir. 1970), United States v. Harkins, 628 F.2d 875 (5th Cir. 1980) and United States Southeast First National Bank of Miami Springs, 655 F.2d 661 (5th Cir. 1981).

In United States v. McCarthy, 514 F.2d 368, 373 (3rd Cir. 1975) the Third Circuit stated:

> Although our proposed procedure for summons enforcement contemplates that provision for an evidentiary hearing be an integral part of the proceedings, implicit in our design is the realization that not every summons enforcement proceeding will require an evidentiary hearing. Thus, if the person summoned neither puts in issue allegations of the complaint nor raises proper affirmative defenses, no evidentiary hearing will be required....

The Third Circuit then reviewed the

defendant's allegations and determined that even though "the allegations are indeed thin, they were sufficient to require the District Court to hear the evidence United States v. McCarthy, 514 F.2d 368, 375. See also United States v. Garden State Nat'l. Bank, 607 F.2d 61, 71 (3rd Cir. 1979).

The Ninth Circuit in United States v. Samuels, Kramer & Co., 712 F.2d 1342 (9th Cir. 1983) stated that,

> [A] taxpayer must answer the Government's prima facie case "through responsive pleadings, supported by affidavits, that allege specific facts in rebuttal." United States v. Kis, 658 F.2d 526, 539 (7th Cir. 1981) (emphasis in original). The facts, however, need only raise sufficient doubt about the Government's purposes in seeking an enforcement of a summons. United States v. Church of Scientology, 520 F.2d at 825. The taxpayer must thus allege facts "from which a court may **infer a possibility** of some

> wrongful conduct by the Government." United States v. Kis, 658 F.2d at 540. (emphasis added). This implication alone is enough to trigger a limited evidentiary hearing. At this stage, the taxpayer need not actually be able to prove the Government's lack of good faith.

712 F.2d 1344.

Cf. with United States v. Alphin, 809 F.2d 236, 238 (4th Cir. 1987) and Hintze v. Internal Revenue Service, 879 F.2d 121 (4th Cir. 1989) where the Fourth Circuit cited the above quotation from Kis, but did not find that the facts supported the intended inference.

The Sixth Circuit in United States v. Will, 671 F.2d 963 (6th Cir. 1982) while upholding the discretion of a District Court Judge to terminate cross examination during an evidentiary hearing, stated that a summonee bearing the burden of proving

bad faith, harassment or other abuse must be afforded an opportunity to substantiate his allegations citing United States v. Church of Scientology, 520 F.2d 818, 824 (9th Cir. 1975)

In summary, the great majority of the circuit courts cited above have liberally allowed an evidentiary hearing for taxpayers who have factually alleged by affidavit an improper purpose for issuance of an I.R.S. administrative summons. The First Circuit did not address in the decision below the decisions of the other circuits or the reasoning applied in its earlier decision United States v. Freedom Church, 613 F.2d 316 (1st Cir. 1979). In the decision under review Copp v. United States, 968 F.2d 1435 (1st Cir. 1992), the First Circuit has applied a restrictive test requiring the taxpayer to prove the

absence of a civil purpose for issuance of the administrative summons. Without an opportunity for an evidentiary hearing after a threshold showing of improper purpose, the I.R.S. will be able to summarily dispose of all I.R.S. enforcement proceedings by alleging a civil purpose for the summons. Granting an evidentiary hearing upon the showing of a minimal threshold of evidence will at least afford the taxpayer an opportunity to disprove the absence of a civil purpose despite the difficulty in meeting such a burden.

CONCLUSION

For reasons cited above, the Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: October 13, 1992

Raymond H. COPP, Jr., Petitioner,
Appellant,

v.

UNITED STATES of America,
Respondent, Appellee.

No. 92-1012.

United States Court of Appeals,
First Circuit.

Heard June 5, 1992.

Decided July 14, 1992.

Taxpayer filed a motion to quash a summons it had been issued by the Internal Revenue Service (IRS). The United States District Court for the District of Massachusetts, A. David Mazzone, J., granted the government's motion for summary enforcement. Taxpayer appealed. The Court of Appeals, Pieras, District Judge, sitting by designation, held that the taxpayer failed to show that the IRS had abandoned its purpose of investigating civil tax liability and, thus, the summons was enforceable, despite the taxpayer's claim that the summons had been served after the matter had been referred for investigation.

Affirmed.

rescue efforts, would not aid the swimmers in distress until the U.S. military

resources were exhausted.

1. Internal Revenue 4-4494

Taxpayer failed to show that Internal Revenue Service (IRS) had abandoned its pursuit of civil tax liability, even if "sole criminal purpose" defense to enforcement of summons had continuing vitality, taxpayer's allegations that audit had been expanded and that IRS would not nationally accept some requested additional documents was insufficient to overcome evidence that IRS was still investigating civil tax liability. 26 U.S.C.A. § 7602.

2. Internal Revenue 4514

In order to obtain evidentiary hearing to question propriety of Internal Revenue Service (IRS summons, taxpayer must make sufficient threshold showing that there was improper purpose behind summons by introducing evidence to support allegations of improper purpose. 26 U.S.C.A. § 7602.

3. Internal Revenue 4517

District court decisions to enforce Internal Revenue Service (IRS) summons without evidentiary hearing are reviewable under abuse of discretion standard. 26 U.S.C.A. § 7602.

Alfred D. Ellis with whom Loren Rosenzweig and Cherwin & Glickman were on brief, for petitioner, appellant.

Sally J. Schornstheimer, Atty., Tax Div., Dept of Justice, with whom James A.

Bruton, Acting Asst. Atty. Gen., Gary R. Allen, Charles E. Brookhart, Attys., Tax Div., Department of Justice, and Wayne A. Budd, U.S. Atty., were on brief for respondent, appellee.

Before CYR, Circuit Judge, RONEY**, Senior Circuit Judge, and PIERAS***, District Judge.

PIERAS, District Judge.

This appeal stems from the issuance of an administrative summons by the Internal Revenue Service in the course of investigation into the income tax liability of appellant Raymond H. Copp for the years 1985 through 1989. The district court granted an IRS motion for summary enforcement of the summons. We affirm.

The summons, which the IRS issued pursuant to 26 U.S.C. § 7602, directed Goldman Sachs & Co., a third-party recordholder to appear, give testimony and produce, documents. Appellant filed a motion Quash the summons, contending primarily that it was improperly served after the IRS had referred the matter to the Justice Department for criminal investigation. The district court

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**Of the Eleventh Circuit, sitting by designation.

***Of the District of Puerto Rico, sitting by designation.

rejected appellant's contention and granted the Government's motion for summary enforcement. Judge Mazzone found, based on an affidavit filed by the IRS agent directing the investigation that no criminal referral had been made and that the summons was issued in good faith to make a civil determination of Copp's federal income tax liability.

Prior to its amendment in 1982, 26 U.S.C. § 7602 authorized the IRS to issue summonses "[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any persons for any internal revenue tax ..., or collecting any such liability." In United States v. LaSalle National Bank, 437 U.S. 298, 98 S. Ct 2357, 57 L.Ed.2d 221 (1978), the Supreme Court considered the limits of this authorization. The Court noted that since Congress created a tax enforcement system with interrelated criminal and civil elements, in enacting Section 7602 it did not intend that the IRS's subpoena power in a given investigation be limited merely because of the presence of a criminal purpose. Id. at 310-11, 98 S.Ct. at 2364-65. The Court held, however, that the IRS's subpoena power did not extend to investigations in which it had abandoned the good faith pursuit of all of its congressionally authorized civil purposes. 437 U.S. at 316-17, 98 S.Ct. at 2367-68.

As a result, after Lasalle a summonee could effectively block the enforcement of

an IRS summons if he could show that it was issued during an investigation in which the IRS had abandoned the pursuit of a civil tax determination or collection. In setting forth the reach of its holding, the LaSalle Court found that an abandonment clearly occurs (and a summons may not be issued) after the IRS refers an investigation to the Department of Justice for criminal prosecution. Id. at 311, 98 S.Ct. at 2365. In addition, aware of a potential for abuse where the IRS delays its referral to the Justice Department in order to gather evidence for a subsequent criminal prosecution, the Court found that an abandonment also occurs where the IRS has "in an institutional sense" abandoned its pursuit of a civil tax liability determination and is instead conducting its investigation for "solely criminal purposes." Id. at 316, 98 S.Ct. at 2367. On this appeal, Copp seeks to invoke this "sole criminal purpose" defense, which he contends the district court incorrectly found was overturned by the 1982 amendments to Section 7602.

[1] The LaSalle Court stated that taxpayers seeking to avail themselves of the sole criminal purpose defense "bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service." Id. As a result, even if the defense has continuing vitality, Copp has the burden of disproving that in this case the IRS is not pursuing a valid civil tax determination. The first hurdle which appellant must therefore clear is the

district court's finding that the IRS has not abandoned the pursuit of Copp's civil tax liability. Copp must show that this finding was clearly erroneous. See, e.g., Hintz v. IRS, 879 F.2d 121, 125 (4th Cir. 1989), reh'd denied en banc; United States v. Claes, 747 F.2d 491, 495 (8th Cir. 1984). We find that this burden has not been met. In seeking enforcement of an administrative summons, the IRS must meet the standard of good faith set forth in United States v. Powell, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). It "must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." Id. at 57-58, 85 S. Ct. at 255. In this case, the IRS filed an affidavit signed by Revenue Agent Ernest Van Loan which was uncontroverted and established each of these elements. The district court relied on this affidavit in finding that "there is no criminal referral, the summons was issued in good faith to make a correct determination of the petitioner's federal income tax liabilities, if any, for the taxable years under investigation, and all of the required procedures of the Internal Revenue Code have been followed." Implicit in the district court's ruling was a finding that in issuing its summons to Goldman Sachs the IRS was not seeking information solely for a criminal purpose. Even under LaSalle, the IRS is entitled to

enforcement of its summons where determination of civil tax liability is at least one of its purposes. Accord 437 U.S. at 310-11, 98 S.Ct. at 2364-65.

[2,3] Copp's effort to establish that the district court's ruling was clearly erroneous is limited. He alleges that several facts-including the alleged expansion of the audit to include tax years outside of 1988 and the refusal of the IRS to conditionally accept a portion of requested additional documents-constitute evidence of an improper purpose on the part of the IRS. He has not, however, demonstrated how these facts, none of which are inconsistent with a civil audit, suggest an improper purpose. Copp also relies on the fact that in a related case before Judge Stahl in the District of New Hampshire, based on similar allegations made by Copp in response to summonses issued in New Hampshire against other third-party recordkeepers, the court concluded that sufficient showing had been made for Copp to pursue a sole criminal purpose defense. Judge Stahl directed the IRS agent to appear at an evidentiary hearing at which Copp would be afforded the opportunity to examine the agent regarding his purpose in issuing the summonses. Judge Stahl's ruling is not before this Court on this appeal, however. And the fact that Judge Stahl in a separate proceeding has allowed Copp to proceed to an evidentiary hearing on this claim does not establish that Judge Mazzone's finding in this case was

clearly erroneous.[1]

The district court order of summary enforcement of the summons is therefore affirmed.

So ordered.

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[1]Copp also contends that Judge Mazzone erred in enforcing the IRS summons without conducting an evidentiary hearing. In order to proceed to an evidentiary hearing to question the propriety of an IRS summons, a taxpayer must make a sufficient threshold showing that there was an improper purpose behind an IRS summons. United States v. Salter, 432 F.2d 697 (1st Cir. 1970). To make this showing, the taxpayer must do more than allege an improper purpose; he must introduce evidence to support his allegations. Id. District court decisions to enforce a summons without a hearing are reviewable under the abuse of discretion standard. Accord Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 324 n. 7, 105 S.Ct. 725, 732 n. 7, 83 L.Ed.2d 678 (1985); Hintze, supra, 879 F.2d at 126; United States v. Samuels, Kramer & Co., 712 F.2d 1342, 1345 (9th Cir. 1983). Appellant again relies primarily on Judge Stahl's conclusion that the allegations made by Copp were sufficient to proceed to an evidentiary hearing. As with his substantive claim, the fact that Judge Stahl reached a contrary conclusion does not yield an abuse of discretion on the part of Judge Mazzone.

APPENDIX

Internal Revenue Code of 1986 (26 U.S.C.):

SEC. 7602 [as amended by Sec. 333(a), Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324]. EXAMINATION OF BOOKS AND WITNESSES.

(a) Authority to Summon, Etc.--For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized--

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other

person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose May Include Inquiry Into Offense.--The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c) No Administrative Summons When There is Justice Department Referral.--

(1) Limitation of authority.--No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in

effect.--For purposes of this subsection--

(A) In general.--A Justice Department referral is in effect with respect to any person if--

(i) The Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination.--A Justice Department referral shall cease to be in effect with respect to a person when--

(i) the Attorney General notifies the Secretary, in writing, that--

(I) he will not prosecute such person for any

offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) Taxable years, etc., treated separately.--For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

* * *

Internal Revenue Code of 1954 (as amended):

§ 7602. EXAMINATION OF BOOKS AND WITNESSES

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized--

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person

having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(Aug. 16, 1954, ch. 736, 68A Stat. 901; Oct. 4, 1976, Pub. L. 94-455, title XIX, § 1906(b)(13)(A), 90 Stat. 1834.)